No. 16206

IN THE

United States Court of Appeals

For the Ninth Circuit

BLUE MOUNTAIN CONSTRUCTION COMPANY, a Corporation,
Appellant,

vs.

H. C. WERNER and TAUF CHARNESKI,
Appellees.

No. 16206

Appeal from the United States District Court for the District of Oregon

HON. GUS J. SOLOMON, *Judge*

APPELLANT'S REPLY BRIEF

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NATIONAL PRINTING CO 73979

FILED
FEB 23 1959

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We will only concern ourselves in this reply brief with what appears to be the principal contention in appellees' brief. That contention, as we understand it, is that appellant's motion for a voluntary dismissal was properly denied by Judge Solomon because appellant was not required as a matter of jurisdiction to bring its contemplated Miller Act suit in the Eastern District of Washington, but could have by amendment brought the appellees' sureties into the Oregon District Court action. We will shortly demonstrate how specious this contention is, but we first point out to the Court that no such position was advanced to the District Judge nor suggested by him as supporting the denial of our dismissal motion.

It is quite true that the Court of Appeals for the Fifth Circuit in the case of *Texas Construction Co. v. U. S.*, 236 Fed. (2d) 138, has held, as appellees' counsel have apparently quite lately discovered, that the requirement of the Miller Act that an action on the bond shall be brought in the district "in which the contract was to be performed and executed and not elsewhere" relates to venue rather than jurisdiction and that an action brought in another district may proceed, in the absence of objection to venue by the defendant contractor or sureties.

We do not think it is necessary to here question the correctness of that decision, but we do point out that it was reached under most unusual circumstances and is seemingly in direct conflict with *U. S. v. Congress Construction Co.*, 222 U. S. 199, 56 L.ed. 163, which latter decision has been cited and followed on

innumerable occasions, and has never been criticized by the Supreme Court.

Assuming, however, that the above-quoted portion of the Miller Act does in fact relate to venue, it is to be remembered that the Miller Act elsewhere requires that suits upon the bond be brought within one year from the date of final settlement of the contract. It is an astounding suggestion that an attorney for a subcontractor should flirt with a loss of his client's rights through expiration of the period of limitations by bringing an action in the wrong district and hoping that the defendant sureties will waive objection to the venue. Moreover, what assurance would one have that the *Texas Construction Co.* case would be followed in another circuit? In this case, the only safe and proper place in which an action upon the appellees' bond could be brought was the Eastern District of Washington, whether the above-quoted provision relates to venue or jurisdiction.

Appellees' counsel did not represent the sureties at the time of the hearing and could not speak for them, as was brought out by colloquy between court and counsel at the hearing (Tr. 37). The record contains utterly nothing to indicate or warrant any claim that the interested sureties would have voluntarily appeared and consented to the Miller Act jurisdiction of the Oregon District Court, nor does it even appear that they were amenable to service there.

In any event, it was not necessarily incumbent on appellant to show reasons for its desire for a voluntary dismissal. As the cases cited in our opening

brief demonstrate, the determining question on such a motion is whether the defendants (appellees) would suffer some prejudice by the granting of the motion which could not be compensated by the imposition of terms. Here it is quite clear that terms would have adequately compensated appellees who had done no more than prepare and file an answer. Thus it is our position that the motion for dismissal should have been granted, even if appellant had not made the strong affirmative showing that it did as to why appellant sought the dismissal.

We again submit that, whether a matter of venue or jurisdiction, appellant's expressed reason for desiring the voluntary dismissal—so as to have a clear field to test its claimed rights under the Miller Act in the Eastern District of Washington—was a most compelling reason in support of the motion for dismissal. We further submit that the record affirmatively discloses a complete absence of reason or justification for the denial of appellant's dismissal motion at the early stage of the proceedings at which it was made, a matter of only forty-four days after the commencement of the action.

Respectfully submitted,

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